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In The Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-1205

JACOB AGGER,
PETITIONER
v.
SEABOARD ALLIED MILLING CORP.
and
BAKERS MANAGEMENT CORP.,
RESPONDENTS

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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THAYER-DEARING COMPANY LEGAL PRINTERS BOSTON

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Respondents, Seaboard Allied Milling Corp. and Bakers Management Corp., respectfully pray that the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 25, 1975, be denied.

The citations to the opinions below, the basis for the jurisdiction of this Court, and the statutory provisions involved in the petition have been adequately set forth by the Petitioner.

QUESTIONS PRESENTED

1. Whether the use of a nominee as a secured party renders invalid an otherwise valid real estate mortgage, properly recorded, and a security interest in personal property, properly perfected by the filing of financing statements under the Uniform Commercial Code.

2. Whether the use of a nominee as a secured party converts an otherwise valid real estate mortgage and personal property security interest into a fraudulent conveyance.

STATEMENT OF THE CASE

Cushman Baking Company (hereinafter "Cushman") operated a bakery in Portland, Maine, and Cushman Bakery operated a bakery in Lynn, Massachusetts, both of which had been operating for many years. The Lynn plant closed in 1967. Seaboard Allied Milling Corp. (hereinafter "Seaboard") had been one of the major suppliers of flour to the Cushman companies for thirty to forty years prior to 1967.

Customarily, deliveries to Cushman were made on an open account basis, with payment for each shipment due 30 days after delivery. During the latter part of 1967, the Cushman account was in arrears. On one of his regular visits to Portland, Otto Bresky, Jr., the Vice President of Seaboard who serviced the account, conferred with Charles Carolan, Treasurer of Cushman. Mr. Carolan advised Mr. Bresky that Cushman's problems arose out of the closing of the Lynn plant, and that working capital was tight. Otto Bresky reported the substance of the meeting to Harry Bresky who, as President of Seaboard, handled its financial affairs.

At a meeting which was held in Portland in late November or early December of 1967, at which Charles Carolan, Harry Bresky and Otto Bresky, Jr. were present, Mr. Carolan explained that the Company was consolidating the Lynn and Portland operations and was converting its business from house-to-house to a wholesale operation. Also discussed at the meeting was the possibility of a loan from Seaboard to Cushman of up to $100,000, which Harry Bresky was considering to assist Cushman over the transition period. At the time of this meeting, Cushman owed Seaboard approximately $31,000.

Another meeting was held in late December, 1967 or early January, 1968 at Seaboard's office in Newton, Massachusetts, at which the same three individuals were present. At this meeting it was agreed that Seaboard would lend Cushman $75,000 to be secured by a second mortgage on the real estate and personal property of Cushman in Portland, Maine, and to be further secured by an assignment of a second mortgage on the Lynn plant. At that time Cushman still owed Seaboard approximately $31,000, and it was intended by all present that this would be paid at the time the loan

was consummated. Seaboard also agreed to extend credit of $25,000 to Cushman for the purchase of flour. As part of the loan arrangement, Cushman was to enter into an agreement to purchase at least 50,000 cwt. of flour annually so long as any balance on account of the loan remain unpaid. The loan would be made and the security taken in the name of Bakers Management Corporation (hereinafter "Bakers"), a Massachusetts corporation which customarily acted for Seaboard in loan transactions to Seaboard's customers. It was also contemplated that Seaboard would be secured for future flour deliveries by assignment of an interest in the security, but since the contemplated assignment was not made, Seaboard conceded at the initial hearing that its claim was unsecured.

The loan documentation was prepared by counsel for Seaboard and by counsel for Cushman. By the terms of its existing first mortgage, held by Union Mutual Life Insurance Company (hereinafter "Union Mutual"), Cushman was required to obtain the consent of Union Mutual in order to make the loan. Such consent was obtained by Cushman and evidenced by an agreement dated February 12, 1968, which included as attached exhibits a copy of the proposed note and security documents to be given to Bakers and a copy of the proposed flour purchase agreement with Seaboard. There was no evidence that either Seaboard, Bakers, or their counsel participated in any way in the effort to obtain Union Mutual's consent to the loan.

Seaboard continued to ship to Cushman flour ordered by Cushman subsequent to the meeting at which the loan was agreed upon, with the result that on the date of the loan closing, March 6, 1968, the amount of the indebtedness due from Cushman to Seaboard for flour had increased to

$61,873.45. There were also two shipments of flour that had ben stopped in transit, which were to be billed at $12,078.22.

The loan was closed on March 6, 1968, in Portland. At the closing, the $75,000 note payable over a period of three years was delivered against delivery of a check of Bakers Management Corporation in like amount, and the security documents were delivered and recorded. Cushman paid to Seaboard the sum of $73,961.67, which represented the outstanding indebtedness of $61,873.45 and the price of the two cars stopped in transit, $12,078.22. The two cars were immediately released.

Subsequent to the loan closing, Seaboard continued to ship flour to Cushman on a regular basis and continued to receive payment for some of its shipments. In addition, payments were made on account of the $75,000 note, reducing the principal balance to $65,561.31. Interest was paid through June 16, 1968.

On August 13, 1968 the present bankrupts filed original petitions in the District Court of Maine under Section 322 of Chapter XI of the Bankruptcy Act for an arrangement with their unsecured creditors. On June 2, 1969, after it became apparent that a plan could not be proposed, they were adjudicated bankrupt in the pending Chapter XI proceedings. Thereafter, within the period provided, Seaboard and Bakers filed Proofs of Claim and petitions to establish liens in the bankruptcy proceedings. On November 16, 1970 the Trustee filed objections to both petitions to establish liens. A hearing was held on the matter on November 19, 1970. Further hearings were held on June 6 and 7, 1972 and July 12, 1972 before Judge Richard E. Poulos in the Bankruptcy Court in Portland, Maine. On June 25, 1974 Judge

Poulos filed an Opinion and Order holding that Bakers' secured claim for $65,561.51 was invalid for lack of proper perfection, and further holding that the transfers were fraudulent conveyances under Sec. 67 d (2)(d) of the Bankruptcy Act. He further held that the trustee's objections to both claims were not barred by the two year Statute of Limitations in Section 11 C of the Bankruptcy Act and disallowed both claims unless voidable preferences aggregating $108,940.02 were surrendered. Seaboard and Bakers filed an Appeal to the United States District Court for the District of Maine. On February 27, 1974 Judge Edward T. Gignoux filed an Opinion and Order reversing the Order of Judge Poulos. The Trustee then filed an appeal to the Court of Appeals for the First Circuit. On November 25, 1975 the Court of Appeals for the First Circuit affirmed the decision of the District Court of Maine that the mortgage and security interest of Bakers' were properly perfected and were not fraudulent conveyances. It reversed the District Court's ruling on the issue of the applicability of the two year Statute of Limitations, but that issue is not involved in the Petition to this Court.

REASONS FOR DENYING WRIT

The writ should be denied because there is no issue presented which meets any of the criteria set forth in Rule 19 of this Court for the exercise of the Court's discretion in granting Certiorari.

The Bankruptcy Judge found that the security interests of Bakers were not perfected. The District Court and the Court of Appeals reversed, holding that the security interests were perfected in accordance with the requirements of Maine law. Petitioner concedes (p. 15 of the Petition) that

this issue (his second question presented) does not constitute a basis for granting Certiorari.

Since the security interests were held to have been properly perfected, and the transfers occurred more than four months prior to the filing of the bankruptcy petition, it is clear that the transfers were not preferences under the Bankruptcy Act. Therefore, Petitioner's statement of the first question presented is not accurate. The issue cannot be whether transfers "with the purpose and effect of concealing . . . the fact that the mortgagee had received a preferential transfer . . ." are void as fraudulent conveyances.

The issue is whether it was error for the District Court and the Court of Appeals to reverse the Bankruptcy Judge's finding that the transfers were fraudulent conveyances.

Respondent submits that this Court should not issue a writ for the purpose of reviewing that question.

It should be noted that it is not the position of Petitioner that there was less than fair consideration for the transfer, but rather that the transfer was made with the actual intent on the part of Cushman to hinder, delay, or defraud creditors and that this intent was well known to Seaboard. Petitioner refers to Sec. 67d (2)(d) of the Bankruptcy Act, which requires proof of an actual intent to hinder, delay, or defraud creditors of the transferor. There was never a finding of fact by the Bankruptcy Judge that Cushman had such intent. In fact, the contrary is true, as Judge Poulos stated,

> That Cushman may not have actually intended to hinder, delay, or defraud creditors is immaterial since Seaboard was in a unique position to dominate or con-

troll the manner in which Cushman's property was disposed. Therefor, it suffices for determining that the transfers were fraudulent to demonstrate that only Seaboard has such requisite intent. (Petitioner's brief, Appendix C pp 83-84).

Clearly, if there had been any evidence of fraudulent intent by Cushman, the Bankruptcy Judge would not have felt constrained to dispense with the necessity of such intent by finding that Seaboard was in control of Cushman, a finding which both the District Court and the Appeals Court agreed was not supported by the evidence.

It would seem that Petitioner has abandoned that position, and now insists that there is proof of debtor's fraudulent intent.

The alleged proof of such intent is nothing more than Cushman's knowledge of, and acquiescence in, the use of Bakers as a nominee of Seaboard. This is the *only* basis for Petitioner's contention that Cushman had the requisite intent. Thus the real question presented is whether the use of a nominee by the secured party required a finding by the Court of Appeals that the security transaction was fraudulent. Respondent submits that the numerous cases cited by both the District Court (Appendix B to the Petition, pp. 50-51) and by the Circuit Court of Appeals (Appendix A to the Petition, p. 35) demonstrate that this is *not* a question of first impression, and, moreover, that the Court's decision that there was no fraud was clearly correct.

Petitioner's argument for the issuance of a writ is based on an alleged requirement that a creditor must disclose potentially preferential transfers. The Circuit Court correctly points out (Appendix A to Petition, p. 35) that there is no such existing requirement of law or public policy.

As the Circuit Court stated,

> A rule requiring the disclosure of potentially preferential secured transactions would present problems of its own. With most preferential transfers there is no possibility of disclosure of the preference to other creditors since there is no public record of the payment of a preexisting debt. Since unsecured potentially preferential transfers would not be affected by such a rule, it may well be questioned whether its limited coverage would be either useful or rationally justified. (Appendix A to Petition, p. 35, footnote 12.)

It has been held by the Court of Appeals for the Second Circuit that the use of a nominee as mortgagee is not a badge of fraud. *In re Locust Bldg. Co., Inc.*, 299 F. 756 (2d Cir. 1924).

Furthermore, in *Coder* v. *Arts*, 213 U.S. 223 (1909), this Court considered the meaning of the expression "intent to hinder, delay, or defraud creditors." The *Coder* case held that actual fraud was required and that the question of fraud depends upon the motive.

> The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. 213 U.S. at 242.

Although recognizing this principle, Petitioner contends that one earlier case, *Blennerhassett* v. *Sherman*, 105 U.S. 100 (1881), and one later case, *Dean* v. *Davis*, 242 U.S. 438 (1917), also decided by this Court, somehow change or modify the rule announced in the *Coder* case.

Neither the *Blennerhassett* case nor the *Dean* case changed the *Coder* rule, for in both cases the recipient of the fraudulent conveyances actively participated in a scheme by the bankrupt which actually misled creditors and was detrimental to unsecured creditors. In *Blennerhassett* the transferors actively touted the bankrupt's worth and credit, knowing that their mortgage made him bankrupt and only recording the mortgage when this effort failed to save the bankrupt. In *Dean* the transferee took a mortgage on all of the transferor's property, which mortgage was by its terms overdue and hence in default days before it was taken. The transferee also knew that transferor was using the proceeds other than in the normal course of his business, so that there was no hope that the mortgage could be paid to avoid foreclosure.

In contrast, in the case at bar the mortgage was given and taken in a sincere effort by both Seaboard and Cushman to assist Cushman, an old customer of Seaboard, through a difficult period of readjustment and thus preserve Cushman's business, such preservation being in the best interest of unsecured creditors. If it were taken for any other purpose, would Seaboard have given additional unsecured credit? In fact, would either have continued the business relationship during the period between the agreement to give the mortgage and the actual effectuation of the mortgage in such a manner that the unsecured bill went from $31,000 to approximately $74,000? Respondents contend

that all of the facts in this case point to a good faith effort to rejuvenate a business and not to such sinister motives as were evident in the *Blennerhassett* and *Dean* cases, which are clearly distinguishable.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be denied.

Respectfully submitted,

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